(2)

No. 97-14

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

STATE OF MICHIGAN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent,

-and-

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN,

Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR INTERVENOR-RESPONDENT

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QUESTION PRESENTED

In 1871, a parcel of land withdrawn and set aside for the Tribe by the Treaty of October 18, 1864, was allotted to a member of the Tribe under the terms of the treaty and patented in fee. In 1987, the land was reacquired by the Tribe in unrestricted fee simple status.

Does the relevant allotment language of the 1864 Treaty evince an unmistakably clear intention to authorize the State to impose its ad valorem real property tax on the Tribe or its land?

PARTIES TO THE PROCEEDINGS

Intervenor-Respondent Saginaw Chippewa Indian Tribe of Michigan adopts and incorporates petitioners' list of parties.

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Intervenor-Respondent Saginaw Chippewa Indian Tribe of Michigan ("Tribe") respectfully requests the Court to deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The Tribe adopts and incorporates petitioners' list of opinions below.

STATEMENT OF JURISDICTION

The Tribe does not disagree with petitioners' jurisdictional statement.

TREATY AND STATUTORY PROVISIONS

The Tribe incorporates petitioners' list of treaty and statutory provisions and adds the following, which are reproduced in the Appendices hereto:

1. Executive Order of May 14, 1855, *reprinted in* I Charles J. Kappler, *Indian Affairs, Laws & Treaties* (1904), at 846-47. Opp. App. at 1a.

2. Article II of the October 18, 1864, Treaty with the Chippewa Indians of Saginaw, Swan Creek, and Black River, 14 Stat. 657 (1864). Opp. App. at 5a.

STATEMENT OF THE CASE

I. Introduction

The Tribe disagrees with petitioners' statement of the case. Pet. at 4-8. The Tribe adopts the Court of Appeals' description of the case as it appears at 106 F.3d 130, 131-32 (6th Cir. 1997), Pet. App. at 2a-4a.

II. The Present Dispute.

The Tribe agrees with petitioners' description of the present dispute, Pet. at 9, but wishes to emphasize that the parcel of land at issue here was part of an original allotment to James Gruette, a "competent" Indian, and that the land was patented to James Gruette on May 27, 1871, in conformity with the provisions of the third article of the Treaty of October 18, 1864, six years before Congress enacted the General Allotment Act. *See* Pet. App. at 60a-62a.

After acquiring the property, the Tribe asserted, not only by virtue of its ownership, but also by virtue of the Tribe's sovereign status as a federally recognized Indian tribe, that the Tribe and its property are exempt from state property taxes.

III. Proceedings Below.

The Tribe accepts the petitioners' description of the proceedings below. Pet. at 9-11.

The district court determined that the legal status of the Tribe's Isabella Reservation would not affect the outcome of the tax question and declined to address the issue. The district court also declined to address the issue raised by the City of Mt. Pleasant of the continued existence and status of the Tribe. All parties, other than the City of Mt. Pleasant, generally agreed that the Tribe currently exists as an Indian tribe. *See* Pet. at 8 n.3. The Reservation status and tribal existence issues were again argued by the parties before the court of appeals. The court of appeals remanded for further proceedings to include adjudication of the petitioners' claims that the land at issue is not reservation land and that the Tribe has been "dissolved." *United States v. Michigan*, 106 F.3d 130, 135 (6th Cir. 1997), Pet. App. at 10a. This remand of key issues is important to the Tribe's argument

here that it is premature for this Court to address the tax question and that the Court should deny the petition.

SUMMARY OF ARGUMENT

No compelling reason exists for this Court to grant discretionary review under the standards of Supreme Court Rule 10. The Petition for Writ of Certiorari should be denied because the decision of the court of appeals was grounded upon the express allotment language of the 1855 and 1864 treaties and the absence of unmistakably clear language permitting state taxation. Thus, the decision correctly interprets and follows this Court's opinion in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 502 U.S. 251 (1992). Every appeals court after *Yakima Nation* except one that has addressed the taxation question presented here has correctly applied the rule of this Court in *Yakima Nation* and held that states are without authority to tax reservation lands or reservation Indians unless Congress' intent to authorize taxation is made unmistakably clear. Finally, it is premature for this Court to review the taxation question because the issues of the status of the Isabella Reservation and the Tribe's status as a sovereign tribal entity are pending before the district court on remand from the court of appeals. This Court should refrain from addressing the tax issue in a vacuum upon hypothetical or disputed factual premises.

I.

THE FACTS ARE UNIQUE TO THIS CASE, AND DISCRETIONARY REVIEW BY THIS COURT IS UNNECESSARY.

This case is not appropriate for review under Supreme Court Rule 10. The decision of the court of appeals was grounded upon the express allotment language of the 1855 and 1864

treaties between the Tribe and the United States and the absence of unmistakably clear language permitting state taxation. *United States v. Michigan*, 106 F.3d at 132, Pet. App. at 3a. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992) ("*Yakima Nation*"). The outcome of this case is of little importance to the interpretation of other treaties or statutes involving other Indian tribes and other Indian reservations. It is therefore not a case of national federal importance.

Petitioners' asserted conflict between the circuits is neither as direct as petitioners' claim nor as immediate as they imply. Pet. at 14. The decisions of the courts of appeal in *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994) ("*Lummi*"); *Leech Lake Band of Chippewa Indians v. Cass County*, 108 F.3d 820 (8th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. July 8, 1997) (No. 97-174) ("*Leech Lake*"); and the instant case involved specific facts and unique provisions of treaties and acts of Congress that are of importance only to those cases and the circumstances presented there. Neither the Ninth Circuit nor the Eighth Circuit were called upon to construe this Tribe's Treaty of October 18, 1864, 14 Stat. 657 (1864), which is of paramount importance in this case. Because different statutes and treaties are involved, there is no real conflict between the decisions of the Sixth and Eighth Circuits and the decision of the Ninth Circuit that would invoke this Court's discretionary review power.

Yakima Nation teaches that each case must stand on its own facts. Yet petitioners assume that if treaty allotments are involved in one case, then *all* treaty tax matters should be governed by that case's opinion. However, it is not the vehicle the United States uses, whether statute, treaty or executive order, that determines the nature of the right created, it is the terms of the

instrument itself. Petitioners also assume that all treaty allotments have the same status. For instance, petitioners assert that *Lummi* involved land allotted and patented "under the provisions of a treaty." Pet. at 14. It was not *a* treaty, it was the Treaty of Point Elliott, 12 Stat. 927 (1855). *Lummi*, 5 F.3d 1355, 1356. Similarly, *Leech Lake* involved interpretation of the Nelson Act of 1889, ch. 24, 25 Stat. 642 (1889). *Leech Lake*, 108 F.3d 820, 829.

II.

THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISION IN *YAKIMA NATION* AND OTHER DECISIONS AFTER *YAKIMA NATION*.

A. The Decision in *Yakima Nation*.

This Court takes a categorical approach to state taxation of reservation lands and reservation Indians. In *Yakima Nation*, the Court reiterated the rule that " '[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)." *Yakima Nation*, 502 U.S. at 258. The Court continued: "And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.' *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n.17 (1987)." *Id.* The Court has not swayed from the categorical approach to the special area of state taxation of Indians since *Yakima Nation*. *E.g.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993).

Yakima Nation hinged on the clearly manifested intention of Congress to permit the state tax, which the Court found in § 6 of the General Allotment Act, 24 Stat. 388, 389 (1887), *as amended* 34 Stat. 182 (1906), *codified at* 25 U.S.C. § 349. That section provides, in part, "*and thereafter* [after issuance of a patent in fee simple] *all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . .*" *Yakima Nation*, 502 U.S. at 258 n.1 (emphasis in original); Pet. App. at 54a.

Thus, after *Yakima Nation*, whether Indian-owned fee land within Indian country is subject to state taxation depends upon whether the land passed out of trust under the authority of the General Allotment Act or some other authority by which Congress has expressly authorized state jurisdiction and state taxation. *United States v. Michigan*, 106 F.3d 130, 133-34 (6th Cir. 1997), Pet. App. at 6a-7a. In this case the treaty makes no reference to authorizing state taxation or jurisdiction.

Contrary to petitioners' claim, the Court in *Yakima Nation* did not suggest that the Court intended later to address land allotted under treaties or statutes other than the General Allotment Act. Pet. at 14. All that was left unresolved was a determination of whether other statutes applied to the lands in *Yakima Nation*. The legal rule to be applied had already been established in *Yakima Nation*. If alienability alone were the test, it is difficult, if not impossible, to explain the terms of the remand in *Yakima Nation*. "If alienability equaled taxability it should not have mattered under which act the land was made alienable. . . ." *Leech Lake*, 108 F.3d at 826.

B. Decisions Following *Yakima Nation*.

In *Lummi*, 5 F.3d 1355 (9th Cir. 1993), the Ninth Circuit addressed the question whether tribally owned fee land that was originally allotted pursuant to the Treaty of Point Elliott, 12

Stat. 927 (1855). The court misread *Yakima Nation* as equating alienability with taxability without examining the specific treaty language at issue in the case. *Lummi* was a two-to-one decision of the panel. Rehearing *en banc* was denied. 5 F.3d at 1360. Judge Beezer's dissent invoked the categorical exemption analysis applied by this Court in *Yakima Nation* and refuted the majority's interpretation of *Yakima Nation*. *Lummi*, 5 F.3d at 1359-60 (Beezer, J., dissenting).

Since 1993, the *Lummi* decision has remained an aberration. Every appeals court that has addressed the taxability of Indian land has rejected *Lummi* and has correctly interpreted and applied the holding of *Yakima Nation* that categorically bars state taxation of Indians or their property within Indian country absent the express consent of Congress.

In *Southern Ute Indian Tribe v. Bd. of County Commr's*, 855 F. Supp. 1194 (D. Colo. 1994), *judgment vacated, appeal dismissed*, 61 F.3d 916 (10th Cir. 1995) (unpublished table decision) ("*Southern Ute*"), the district court rejected the majority decision in *Lummi* and followed Judge Beezer's dissent, noting that if alienability were the only test for taxability, the Court in *Yakima Nation* would not have left open the question whether patenting under an act other than the General Allotment Act would require a different result. *Southern Ute*, 855 F. Supp. at 1200; *Yakima Nation*, 502 U.S. at 270. On appeal, the Tenth Circuit agreed with the district court that "[d]ifferences in the manner in which certain parcels were originally patented may affect whether they are taxable today." *Southern Ute*, 1995 WL 427683, at *2 (10th Cir. 1995), Opp. App. at 9a.

In the instant case, the district court rejected the reasoning of *Southern Ute* and followed *Lummi*. *United States v. Michigan*, 882 F. Supp. 659, 668-72 (E.D. Mich. 1995), *rev'd*, 106 F.3d 130 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3085

(U.S. June 30, 1997) (No. 97-14), Pet. App. at 23a-29a. The district court's misinterpretation of *Yakima Nation* was corrected by the Court of Appeals. *United States v. Michigan*, 106 F.3d at 132-34, Pet. App. at 4a-7a.

In *Leech Lake*, the district court followed the decision in *Lummi. Leech Lake Band of Chippewa Indians v. Cass County*, 908 F. Supp. 689 (D. Minn. 1995), *aff'd in part, rev'd in part*, 108 F.3d 820 (8th Cir. 1997). The Eighth Circuit Court of Appeals reversed. The court followed *Yakima Nation* and held that tribal fee lands that had been alienated under sections of the Nelson Act that did not incorporate the General Allotment Act are not subject to state tax. *Leech Lake*, 108 F.3d at 829-30.

In *In re Kaul*, 261 Kan. 755, 933 P.2d 717 (1997), the Supreme Court of Kansas reviewed the Ninth Circuit decision in *Lummi* and the district court decisions in *United States v. Michigan*, *Leech Lake* and *Southern Ute*. At the time, the Kansas court did not have the benefit of the Sixth Circuit decision in *United States v. Michigan* or the Eighth Circuit decision in *Leech Lake*. Nevertheless, the court was persuaded by the district court decision in *Southern Ute* and Judge Beezer's dissent in *Lummi* and concluded that "[u]nder the Supreme Court's decision in *Yakima*, alienability of the land is not the sole test for the imposition of ad valorem tax upon Kaul's property." 261 Kan. at 775, 933 P.2d at 730. Express congressional intent to allow state taxation must be found. *Id.* The court remanded the case for additional factual findings on the source of the fee patents and the propriety of state taxation in light of the treaties between the Tribe and the United States and this Court's decision in *Yakima Nation*. *Id.*

The Court should deny the petition. The Sixth Circuit decision, which correctly interprets *Yakima Nation* and other precedents of this Court, should be allowed to stand. Federal

and state courts should be allowed further opportunity to build upon the existing body of case law that correctly follows this Court's precedents. The decision of the Ninth Circuit panel in *Lummi* does not create an immediate or permanent bar to national consistency on the issue of state authority to tax Indians or their property. Any conflict that might exist between the Ninth Circuit and the Sixth Circuit will likely be resolved without this Court's intervention.

All other federal courts of appeal and at least one state court have rejected *Lummi*'s misreading of *Yakima Nation* and some of the statements of the Ninth Circuit decision. Disagreement between the circuits may disappear. The Ninth Circuit may, on its own, reconsider its approach in *Lummi*. There is no compelling reason or immediate need for this Court to grant the petition and burden itself with factually intricate issues while state and federal courts continue appropriately to address the issue.

III.

IT IS PREMATURE FOR THIS COURT TO REVIEW THE DECISION BELOW BECAUSE TWO KEY ISSUES MUST FIRST BE RESOLVED ON REMAND.

Another reason why this Court should deny the petition is that the key issues of Reservation status and tribal recognition have not yet been decided, and it is premature for this Court to grant review while those issues remain subject to the court of appeals' remand order. The district court below declined to address the questions of reservation or tribal status believing them to be irrelevant to the authority to tax. *United States v. Michigan*, 882 F. Supp. at 663, Pet. App. at 14a-15a. However, taxability here depends, in the first instance, on whether or not the property is located within an Indian reservation or within

Indian country. *E.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991). The district court below correctly observed that application of *Yakima Nation* rests "on the implicit postulate that the lands involved here are 'reservation lands.' " *United States v. Michigan*, 882 F. Supp. at 665, Pet. App. at 18a. Likewise, whether the landowner is a federally recognized tribal entity is crucial to the tax question.

Although the Tribe and the petitioners urged the court of appeals to address the status of the Isabella Reservation, the court expressed no opinion but remanded the case to the district court for resolution of the petitioners' claim that the land at issue is not reservation land and that the Tribe has been dissolved. A scheduling conference was called by the district court on August 25, 1997, and a scheduling order on remand is forthcoming.

This Court should refrain from addressing the tax issue in a vacuum before the district court and the court of appeals have determined whether the land at issue is within the Tribe's Reservation or Indian country and whether the Tribe continues to exist as a sovereign tribal entity. For the Court to address the petition now will not resolve the entire dispute between the parties, and it is premature to address the tax issue upon hypothetical or disputed factual premises.

CONCLUSION

This case involves facts and issues unique to this Tribe and the petitioners. An irreconcilable conflict among the circuits does not exist. All but one appellate court has correctly applied this Court's decision in *Yakima Nation*. It would be premature for this Court to address the tax issue before the district court remand is completed. In the absence of any compelling reason for this Court to grant the petition, this Court should exercise its judicial discretion and deny the petition for writ of certiorari.

September 2, 1997

Respectfully submitted,

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APPENDIX A — EXECUTIVE ORDER OF MAY 14, 1855. I KAPPLER 846-47

MICHIGAN.

Isabella Reserve.

[In Mackinac Agency; occupied by Chippewa of Saginaw, Swan Creek, and Black River; Area 3 3/4 square miles; established by Executive order and treaties of August 2,1855, and October 18, 1864.]

Department of the Interior,
Office of Indian Affairs, December 11, 1854.

Sir: I inclose a copy of a letter from Messrs. George Smith and P. O. Johnson, missionaries of the Methodist Episcopal Church in Michigan, addressed to Rev. Dr. Durbin, and by him forwarded to this office, in relation to certain desired reservations of public lands.

In consideration of certain contemplated arrangements with the Indians in Michigan during the ensuing spring, I have to ask that you reserve from public sale the lands designated in the letter of Messrs. Smith and Johnson.

I have also received a communication from the Rev. J. P. Durbin, corresponding secretary of the Missionary Society of the Methodist Episcopal Church, asking for an additional reservation of lands near Iroquois Point, back from the lake.

For the reasons above, I concur in the request, and ask that several additional sections to those already reserved be made of the lands in the vicinity of Iroquois Point.

Very respectfully, your obedient servant,
Geo. W. Manypenny, *Commissioner.*

John Wilson, Esq.,
Commissioner of General Land Office.

General Land Office, *December 20, 1854.*

Sir: I have the honor to transmit a communication from the Commissioner of Indian Affairs, addressed to this office, bearing date the 11th instant, and its inclosure, recommending, for reasons stated, the withdrawal from market and reservation for Indian purposes the lands in Isabella County, Mich., or so much thereof as may be deemed expedient.

The pink-shaded lines on the inclosed printed map show the limits of Isabella County, covering, according to the maps of this office, townships 13, 14, 15, and 16 north, of ranges 3, 4, 5, and 6 west of the Michigan meridian, in the Ionia district, the whole of which are requested to be reserved, and the numbers 1, 2, 3, 4, 5, 6, placed on certain townships, show the order of the preference to be given should it be determined to reserve less than the east half of the county.

From an estimate just made at this office, it appears that only about two-ninths of the whole surface has been disposed of, although three of the townships have been in market since 1833, and the balance since 1840.

As regards the conditions mentioned in the Rev. George Smith's letter (among the papers), that the reserve be made "for the Chippewa Indians of Michigan, to be purchased under the direction of the missionary society," etc., I have to remark that

no such privilege could, in my opinion, be given without legislation of Congress.

I am, very respectfully, your obedient servant,
John Wilson, *Commissioner.*

Hon. Robert McClelland,
Secretary of the Interior.

Department of the Interior, *April 12, 1855.*

Sir: I have the honor to submit herewith two letters from the Commissioner of the General Land Office in relation to the withdrawal of certain lands in Michigan from sale with a view to the benefit hereafter of certain Indian tribes, in accordance with the intimations of the Indian Office.

The first letter, that of the 20th of December last, has reference to lands in Isabella County, Michigan, and that on the 10th instant to land in a new county called Emmett, in the same State, the former county containing 16 and the latter 27 townships and fractional townships, and the withdrawal appears to be desired by the Indian Office "in consequence of certain contemplated arrangements with the Indians in Michigan during the present spring." The matter connected with the letter of the 20th December has been delayed, waiting more specific information from the Indian Office as to the specific land wanted, which is supplied by this letter of the 10th instant from that office.

The philanthropic policy of furnishing these Indians, who are desirous of becoming cultivators of the soil, with land for that purpose, to the greatest possible extent separated from evil

example or annoyance of unprincipled whites, who might be disposed to settle in their vicinity, or within their midst, after farms already opened by them had rendered the surrounding land more valuable, is apparent, and I have no hesitation in recommending your sanction to the withdrawal of the lands indicated in each of said communications from the Land Office, but it must be with the express understanding that no peculiar or exclusive claim to any of the land so withdrawn can be acquired by said Indians, for whose future benefit it is understood to be made, until after they shall by future legislation be invested with the legal title thereto.

With much respect, your obedient servant,

R. McClelland, *Secretary.*

The PRESIDENT OF THE UNITED STATES.

[Indorsement.]

May 14, 1855.

Let the withdrawal of all the vacant land in Isabella County be made with the express understanding contained in the letter of the Secretary of the Interior to me of the 12th instant.

Franklin Pierce.

(Superseded by treaty of August 2, 1855, with Chippewas of Saginaw, Swan Creek, and Black River, 11 Statutes, 633.)

APPENDIX B — ARTICLE II, TREATY WITH THE CHIPPEWA INDIANS. OCTOBER 18, 1964. 14 STAT. 657

ARTICLE II. In consideration of the foregoing relinquishments, the United States hereby agree to set apart for the exclusive use, ownership, and occupancy of the said *of the said* Chippewas of Saginaw, Swan Creek, and Black River, all of the unsold lands within the six townships in Isabella county, reserved to said Indians by the treaty of August 2d, 1855, aforesaid, and designated as follows, viz: —

The north half of township fourteen, and townships fifteen and sixteen north, of range three west; the north half of township fourteen and township fifteen north, of range four west, and townships fourteen and fifteen north, of range five west.

APPENDIX C — UNPUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, 1995 WL 427683 (JULY 20, 1995)

SOUTHERN UTE INDIAN TRIBE, doing business as Red Willow Production Company, Plaintiff-Appellee,

v.

LA PLATA COUNTY, Board of County Commissioners, State of Colorado; Fred Klatt, Shirley M. Baty, Frank Joswick, Commissioners of La Plata County, Colorado; Ed Murray, Treasurer of La Plata County, Colorado; Craig Larson, Assessor of La Plata County, Colorado; Colorado, State of; Revenue, State of Colorado, Department of; Renny Fagan, Executive Director of Department of Revenue, State of Colorado; Oil and Gas Conservation Commission of the State of Colorado; Susan Mccannon, acting Director of the Oil & Gas Conservation Commission, State of Colorado; Property Taxation, State of Colorado, Division of; Mary Huddleston, Property Tax Administration for the State of Colorado, Defendants-Appellants.

State of California; State of South Dakota; State of Utah; State of North Dakota; Saginaw Chippewa Indian Tribe of Michigan; Shoshone and Northern Arapaho Tribes of the Wind River Reservation; Council of Energy Resource Tribes; Jicarilla Apache Tribe; Ute Indian Tribe of the Uintah and Ouray Reservation; Native Village of Karluk; the Rosebud Sioux Tribe; the Confederated Tribes of the Umatilla Indian Reservation; the Crow Tribe of Indians; the Oglala Sioux Tribe; Yakama Indian Nation, Amici Curiae.

No. 94-1310.

United States Court of Appeals, Tenth Circuit.

July 20, 1995.

Appendix C

Before KELLY, SETH, and HENRY, Circuit Judges.

ORDER AND JUDGMENT*

*1 This appeal is brought by the Board of County Commissioners of La Plata County, the State of Colorado and various officials of those parties. It challenges the district court's grant of summary judgment to the Southern Ute Indian Tribe. Because this is a final decision of the United States District Court for the District of Colorado, our jurisdiction is proper under 28 U.S.C. 1291.

The Southern Ute Indian Tribe initiated this action requesting a declaratory judgment that it is exempt or immune from the imposition of ad valorem taxes on lands and mineral interests held by the Tribe or tribal enterprises within its reservation boundaries. The Tribe's Complaint thus broadly encompasses any property meeting the above stated criteria. The incident which appears to have precipitated the Tribe's claim at this time was the potential taxation of property acquired by the Tribe's business enterprise, Red Willow Production Company, from Conoco, Inc. about January 15, 1993. Ad valorem taxes for 1992, the year prior to the Tribe's ownership of the property acquired from Conoco, were assessed against Conoco and subsequently paid by Conoco. By this payment by Conoco of the assessment the issue as to this tract became moot, and we are left only with general assertions as to real property and personal property without descriptions.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

Appendix C

The basic Claim for Relief in the Complaint stated that the Tribe seeks: "Preliminary and permanent injunctive relief against Defendants prohibiting them from: "(a) Seeking to collect any state or local taxes on real or personal property, including mineral interests, royalty interests, working interests, oil and gas wells, and oil and gas equipment owned by the Tribe located within the boundaries of the Southern Ute Indian Reservation." Pending its determination regarding the merits of the Tribe's claim, the district court granted a preliminary injunction barring the County or State from taxing or otherwise attaching or encumbering Southern Ute owned property or proceeds derived therefrom.

After expressing concern regarding the ripeness of the Tribe's claim, the district court nevertheless addressed the merits of the action. The court then held that the County and State, absent Congressional action, "may not directly tax real property interests held by the Tribe in fee simple nor may the County and State tax mineral interests owned by the Tribe relating to lands within the boundaries of the Reservation."

The trial court's concern was expressed as follows: "My initial concern with this case is ripeness. The only taxes which have actually been assessed are those concerning the property the Tribe acquired from Conoco, Inc., a former third-party defendant. Conoco paid those taxes, leading the County and State to move for dissolution of the preliminary injunction. I denied that motion, holding it was clear that the Defendants sought to impose taxes on any property held by the Tribe in fee, as evidenced by their argument on summary judgment."

***2** It is the issue of ripeness raised initially by the district court with which we are first concerned. Although this question is not expressly raised in the issues presented to this court, "when

a ripeness question in a particular case is prudential, we may raise it on our own motion[.]" Reno v. Catholic Social Services, Inc., __ U.S. __, 113 S.Ct. 2485, 2496 n. 18. Even though a dispute may exist, if it has not developed factually to present a definitive issue upon which a court can act, the doctrine of ripeness applies which requires that federal courts decline to then decide those issues which are not yet fit for adjudication. Regional Rail Reorganization Act Cases, 419 U.S. 102, 138. This doctrine concerns prudential reasons for refusing to exercise jurisdiction. Buckley v. Valeo, 424 U.S. 1, 114. A federal court cannot render a decision which is merely advisory. See Poe v. Ullman, 367 U.S. 497; CSG Exploration Company v. Federal Energy Regulatory Commission, 930 F.2d 1477, 1482 (10th Cir.).

As mentioned by the trial court, no assessment of property of the Tribe has been made except the former Conoco property, and that issue is moot. An assessment is the prerequisite to "taxation" and none has been made to create the issues sought to be litigated. Neither the Complaint nor the record describes any particular piece of property concerned. We have only a general claim that taxation would be improper.

We agree with the trial court's statement: "Differences in the manner in which certain parcels were originally patented may affect whether they are taxable today. For example, property originally patented by homesteaders under early laws dealing with the Ute Indians may require different tax treatment than property patented by individual Indian allottees under those same laws. Furthermore, the Tribe itself has not been clear as to whether any property it now owns in fee falls within the latter category. Finally, it is not clear, with respect to the Tribe's ownership of certain forms of mineral interests, whether the surface rights are held in trust or in fee and by whom. Therefore,

without more specific information on the type of property sought to be taxed, my treatment of these motions is necessarily general."

A review of the Southern Ute Complaint further demonstrates the problem. The Complaint states that "[t]he County of La Plata . . . has threatened to impose ad valorem taxes upon the mineral interests and equipment acquired by the Tribe", and further alleges that "[t]he State of Colorado . . . has threatened to impose taxes . . . upon the Tribe associated with the Tribe's operations on land within the Southern Ute Indian Reservation." (Emphasis added.) The threat of imposed taxes does not supply the finality necessary to a determination that a claim is fit for judicial review. See Abbott Laboratories v. Gardner, 387 U.S. 136 (a ripeness determination depends upon the fitness of an issue for judicial resolution and the hardship to the parties of withholding judicial consideration). See also Sierra Club v. Yeutter, 911 F.2d 1405, 1417 (10th Cir.). Further, we conclude that delaying consideration until such time as there is an actual assessment does not impose a hardship on the parties. Abbott Laboratories, 387 U.S. at 149.

*3 Accordingly, we must hold that this action is not ripe for adjudication. There has been no action taken by the Appellants herein which has been "felt in a concrete way by the challenging part[y]." Abbott Laboratories, 387 U.S. at 148-49.

We therefore conclude that the district court erred in granting summary judgment. Accordingly, we DISMISS this appeal, and REMAND with directions to VACATE the previous judgment of the district court, and dismiss the Complaint without prejudice.

IT IS SO ORDERED.

Appendix C

HENRY, Circuit Judge, dissenting.

The majority's conclusion is well-stated and thoroughly defensible. Though the district court was also concerned with ripeness, I believe it made the correct decision to reach as many issues as it could both for the sake of efficiency and because of the nature of the parties and the "legislative confusion" in this area. See Memorandum Opinion and Order, Brief of County Appellants, Attachment A, at 2-3. I do not, therefore, agree with the majority's conclusion that the issues in this case are not ripe for adjudication.

In my opinion, the fact that state and county officials have threatened to impose ad valorem taxes and various mineral taxes on non-trust fee lands is sufficient to establish the ripeness of the dispute. " "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." "Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 581-82 (1985) (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974) (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923))).

I view this case as analogous to Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir.1987), aff'd, 484 U.S. 997 (1988). There, the district court concluded, inter alia, that the application of state severance and gross proceeds taxes to coal mined within the boundaries of a reservation was not ripe for adjudication because no mining had occurred there. The Ninth Circuit reversed, concluding that "[t]he Tribe need not wait for mining to commence to challenge the taxes' application to coal mined within the Reservation boundaries. . . . The taxes are already in effect and Montana intends to apply them to this coal." Id. at 903.

I think the same is true here. The appellees intend to apply ad valorem taxes and certain taxes on minerals to non-trust lands held in fee by the Tribe within the boundaries of the Ute Reservation. The Tribe has sought prospective relief to prevent this taxation. Moreover, the applicable law has been analyzed by the district court, the parties, and numerous amici curiae.

I do agree with the district court's observation that the parties have discussed some of the issues in a very general way. I think this is particularly true of some of the mineral taxes and that, as to some issues concerning mineral taxation, further analysis might reveal that the current record is insufficient to make the necessary determinations as to whether these taxes are proper within reservation boundaries. Nevertheless, I believe that the dispute is concrete enough on a number of the issues and that, given the time and effort expended by the parties, the district court, and this court, we should proceed to the merits of as many issues as possible.

*4 Accordingly, I respectfully DISSENT.